Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

in the

Supreme Court

of the

United States

CASE NO. 78-684

CITY LINEN, COAT & APRON SUPPLY SERVICE, INC.; SOUTHERN LINEN SUPPLY & LAUNDRY CO., INC.; AMERICAN SERVICE CORPORATION; JEROME HERSKOWITZ AND WILLIAM STRNISKO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

DANIEL NEAL HELLER
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in the

Supreme Court

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CASE NO.

CITY LINEN, COAT & APRON SUPPLY SERVICE, INC.; SOUTHERN LINEN SUPPLY & LAUNDRY CO., INC.; AMERICAN SERVICE CORPORATION; JEROME HERSKOWITZ AND WILLIAM STRNISKO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

Petitioners, CITY LINEN, COAT & APRON SUPPLY SERVICE, INC.; SOUTHERN LINEN SUPPLY & LAUNDRY CO., INC.; AMERICAN SERVICE CORPORATION; JEROME HERSKOWITZ and WILLIAM STRNISKO, respectfully petition the Court for a Writ of Certiorari to the United States Court of Appeals, Fifth Circuit, and state:

JURISDICTION

1. Petitioners seek review of an, as yet, unreported opinion (included in appendix) by the United States Court of Appeals, Fifth Circuit, in the case of *United States v. American Service Corp.*, case number 77-5622, decided September 22, 1978.

2. The grounds upon which jurisdiction of the Court is invoked are as follows:

A. The Court of Appeals has decided a question as to the jurisdictional sufficiency of a federal indictment in a way which conflicts with applicable decisions of this Court.

B. By upholding the indictment which does not contain allegations charging a federal offense, the Court of Appeals has so far departed from the accepted usual course of judicial proceedings, or so far sanctioned such departure by the trial court, as to call for an exercise of the Court's power of supervision.

3. The statutory provision conferring jurisdiction in the Court to review the aforesaid judgment by Writ of Certiorari is 28 U.S.C. §1254.

QUESTION PRESENTED FOR REVIEW

4. MUST A SHERMAN ACT ANTITRUST INDICTMENT CONTAIN FACTUAL ALLEGATIONS RELATING THE DEFENDANT'S ALLEGED WRONGFUL CONDUCT TO INTERSTATE COMMERCE?

5. The statute which the case involves is 15 U.S.C. §1, set out in the appendix.

STATEMENT OF THE CASE AND FACTS

6. The facts material to consideration of the question presented are all contained in the Court of Appeals opinion, and are as follows:

A. The petitioners (linen suppliers in *intra*state commerce in South Florida) pleaded *nolo contendere* to a criminal antitrust indictment brought pursuant to the aforementioned statute.

B. The petitioners attacked the indictment on the ground that it failed "to allege the nexus with interstate commerce requisite for federal jurisdiction under the Sherman Act."

C. Only paragraph nine of the indictment set forth any facts upon which a determination could be made as to whether interstate commerce was involved. It alleged that petitioners regularly received substantial shipments of new linen supplies from out-of-state (approximately to the value of $4,000,000 in 1973). However, the paragraph contained no further allegations showing the disposition of those goods. All that the paragraph additionally alleged with respect to the linen supplies was that:

> Such supplies are ordered in anticipation of the continuing demands of the companies' customers for new and replacement linens

Then, without alleging where, when, or how the goods were involved in interstate commerce, the indictment in paragraph 13 charged that the purely *intra*state conduct of the petitioners (to divide and allocate customers) had the effect of unreasonably restraining the flow of linen supplies in interstate commerce.

REASONS FOR GRANTING THE WRIT

7. The Court has held that:

> The Sherman Act, unlike most traditional criminal statutes, does not, in clear and categorical terms, precisely identify the conduct which it proscribes.

United States v. United States Gypsum Co., ___U.S.___, 57 L Ed.2d 854, 870, 98 S. Ct. 2864 (1978).

Therefore, because of the vague provisions of 15 U.S.C. §1, we submit that it is especially appropriate that an indictment returned thereunder set forth minimal factual allegations to support federal jurisdiction. No less is required of the Justice Department in procuring indictments involving other federal offenses. There is no reason to excuse the government from following the same course with respect to antitrust indictments. Otherwise, the federal authorities are encouraged to extend their authority beyond the outer limits of interstate commerce and into intrastate commerce — an area which is not within the proscription of the Sherman Act.

But, permitting a federal antitrust indictment without requisite jurisdictional allegations to stand, opens the door to yet another vice. One which goes to the heart of due process — failure to put the defendant on notice of how his conduct violated federal law. As a consequence, he is left with the choice of either defending himself in the dark or submitting to charges which, in fact, do not set forth a federal criminal violation.

APPLICABLE LAW

8. *Walling v. Jacksonville Paper Company*, 317 U.S. 564, 63 S. Ct. 332, 87 L.Ed. 460 (1943) establishes that interstate commerce continues when goods come from out of state

> . . . through [defendants'] warehouse[s] and on to customers whose prior orders or contracts are being filled.

But the indictment in the case at bar contains no allegations that petitioners purchased the linen supplies in response to "prior orders or contracts." Only, that they did so "in anticipation of the continuing demands of the companies' customers."

9. Thus, the indictment did not relate the petitioners' wrongful conduct to interstate commerce in violation of the Sherman Act.

10. Moreover, the indictment did not allege that the petitioners intended to commit any offense in interstate commerce. *United States v. United States Gypsum Co.*, supra.

11. Nor were the jurisdictional omissions in the indictment cured by the bare allegation that the petitioners' conduct unreasonably restrained interstate commerce. That statement was meaningless in the absence of allegations showing interstate commerce which the petitioners' conduct did affect.

12. The Fifth Circuit, in finding the indictment jurisdictionally adequate, concluded that the phrase,

"continuing demands," cured any alleged jurisdictional inadequacy.

True, *Walling* does hold in note 4 that out of state goods ordered in response to continuing demands which have come to rest intrastate can "at times" retain their interstate character. But, even then, the goods can retain their interstate label only if they have been ordered in anticipation of the needs of *specific* customers.

The indictment in this case does not allege any facts which change the *intra*state character of the goods as revealed in the indictment. There are no allegations bringing the goods within the "at times" interstate commerce exception discussed in *Walling*. Nor does the indictment allege that the goods were ordered in anticipation of the demands of *specific* customers. Thus, if the indictment in question is held to be jurisdictionally sound, every retailer and wholesaler and anyone else for that matter, who orders goods from out of state is subject to being charged with a violation of the Sherman Act, even though their conduct is unrelated to interstate commerce.

That may be what the Department of Justice is seeking to accomplish, unwittingly or consciously. Nonetheless, the Sherman Act was enacted to reach restraints of trade involving interstate commerce only. *United States v. Oregon Medical Soc.*, 343 U.S. 326 72 S. Ct. 690, 96 L. Ed. 978.

13. Since the scope of the Sherman Act is thus limited to interstate commerce, federal jurisdiction over the conduct of the petitioners is circumscribed. Their plea of *nolo contendere* did not cure the jurisdictional

deficiency of the indictment. The only effect of the plea was to admit those well-pleaded facts which showed jurisdiction. *United States v. Tallant*, 547 F.2d 1291 (5th Cir. 1977) cert. denied, 434 U.S. 889, 98 S. Ct. 262, 54 L. Ed.2d 174 (1978). However, the subject indictment is devoid of any facts, well-pleaded or otherwise, showing federal jurisdiction.

While it may be that petitioners' conduct violated Florida's antitrust laws, Chapter 542, Florida Statutes (1915), that is a matter with which "the national government has no concern." *Blitz v. United States*, 153 U.S. 308, 14 S. Ct. 924, 38 L. Ed. 725 (1894). In short, if there is any doubt as to whether the indictment precisely shows federal jurisdiction, it must be resolved in favor of petitioners.

> . . . [I]t should not be left in doubt or to mere inference, from the words of the indictment whether the offense charged [is] one within federal cognizance.

Blitz v. United States, supra.

14. In conclusion, we note that the Grand Jury in the case at bar, for whatever reason, did not include any allegations in the indictment showing a nexus between petitioners' conduct and interstate commerce. Respectfully, we do not believe that either the government or the Court of Appeals should subject the petitioners to prosecution for conduct involving interstate commerce "which the Grand Jury did not charge." *Stirone v. United States*, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed.2d 252 (1960).

15. Accordingly, we submit the indictment was jurisdictionally defective and the proceedings conducted thereunder were void and the judgments of conviction should be reversed.

WHEREFORE, we respectfully pray for the granting of the Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the aforegoing Petition were mailed to: JOHN H. SHENEFIELD, Assistant Attorney General, JOHN J. POWER, III, DANIEL J. CONWAY, Attorneys, Department of Justice, Washington, D.C., 20530 and to the Solicitor General, Department of Justice, Washington, D.C. this 20th day of October, 1978.

DANIEL NEAL HELLER

APPENDIX

SHERMAN ACT

15 U.S.C. §1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition, under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not ex-

ceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

UNITED STATES of America,
Plaintiff-Appellee,

v.

AMERICAN SERVICE CORPORATION, City Linen, Coat & Apron Supply Service, Inc., Jerome Herskowitz, Southern Linen Supply & Laundry Company, Inc., and William Strnisko, Sanitary Linen Service Co., and Bernard Trichter,
Defendants-Appellants.

No. 77-5622

Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

Sept. 22, 1978.

Defendants entered nolo contendere pleas and were convicted in the United States District Court for the Southern District of Florida, Joe Eaton, J., under an indictment charging a combination and conspiracy to divide, allocate and apportion customers in violation of the Sherman Act. Defendants appealed, and the Court of Appeals held that indictment was sufficient to allege a federal offense under both the flow of commerce and the affecting commerce tests.

*Rule 18, 5 Cir.; see *Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.

Affirmed.

1. Criminal Law — 275

A plea of nolo contendere has the effect of a guilty plea and admits all facts well pleaded in the indictment.

2. Criminal Law — 1143(8)

A judgment entered on a plea of nolo contendere leaves open for appellate review the sufficiency of the indictment.

3. Monopolies — 29

The presence of a restraint on interstate commerce is a jurisdictional requirement for an offense under the Sherman Act section which makes illegal any contract, combination or conspiracy in restraint of trade or commerce. Sherman Anti-Trust Act, §1 et seq. as amended 15 U.S.C.A. §1 et seq.

4. Monopolies — 31(1.3)

Allegations that the offending acts occurred in the flow of commerce or substantially affected interstate commerce are sufficient to meet the jurisdictional requirement for an offense under the Sherman Act that a restraint on interstate commerce be present. Sherman Anti-Trust Act, §1 et seq. as amended 15 U.S.C.A. §1 et seq.

5. Monopolies — 31(1.3)

An indictment charging violation of the Sherman Act section which makes illegal every contract or conspiracy in restraint of trade or commerce may charge either that the offending acts occurred in the flow of commerce or that they substantially affected interstate commerce or both. Sherman Anti-Trust Act, §1 et seq. as amended 15 U.S.C.A. §1 et seq.

6. Monopolies — 31(1.3)

Indictment charging defendants with engaging in a combination and conspiracy to divide, allocate and apportion customers in violation of the Sherman Act sufficiently alleged the nexus with interstate commerce required for federal jurisdiction under the Act where the indictment stated that defendants received linen supplies from out-of-state manufacturers and that the alleged combination and conspiracy unreasonably restrained the flow of linen supplies in interstate commrce and restrained competition in the linen service industry in South Florida. Sherman Anti-Trust Act, §1 et seq. as amended 15 U.S.C.A. §1 et seq.

7. Monopolies — 31(1.3)

For purpose of determining whether criminal antitrust indictment states a nexus with interstate commerce sufficient to allege a federal offense under the "flow of commerce" test, question is at what point along the path from manufacturer to consumer the flow might have stopped, therby rendering any subsequent anticompetitive conduct purely interstate in nature. Sher-

man Anti-Trust Act, §1 et seq. as amended 15 U.S.C.A. §1 et seq.

8. Monopolies —31(1.3)

Where criminal antitrust indictment alleged that defendants received linen supplies from out-of-state manufacturers and stated that such supplies were "ordered in anticipation of the continuing demands of the companies' customers for new and replacement linens," statement was sufficient under the "flow of commerce" test to allege a federal offense; in context, the indictment alleged a flow from manufacturers to defendants to consumers, even though the goods might temporarily come to rest on defendants' shelf. Sherman Anti-Trust Act, §1 et seq. as amended 15 U.S.C.A. §1 et seq.

9. Monopolies —29

A temporary pause in transit does not necessarily terminate the interstate journey, for criminal antitrust purposes. Sherman Anti-Trust Act, §1 et seq. as amended 15 U.S.C.A. §1 et seq.

10. Monopolies —31 (1.3)

For purpose of determining whether criminal antitrust indictment sufficiently alleged the nexus with interstate commerce that is required for federal jurisdiction under the Sherman Act, courts look to the character of the restraint, not to the magnitude of the restraint. Sherman Anti-Trust Act, §1 et seq. as amended 15 U.S.C.A. §1 et seq.

Appeals from the United States District Court for the Southern District of Florida.

Before GODBOLD, RONEY and RUBIN, Circuit Judges.

PER CURIAM:

This is an appeal from a final judgment entered in a criminal antitrust case against appellants upon *nolo contendere* pleas for violation of section 1 of the Sherman Act 15 U.S.C.A. §1. The sole thrust of the appeal is directed to the sufficiency of the indictment to allege the nexus with interstate commerce requisite for federal jurisdiction under the Sherman Act. Finding that the indictment sufficiently alleges defendants' actions to be within interstate commerce, we affirm.

[1-5] A plea of *nolo contendere* has the effect of a guilty plea and admits all facts well pleaded in the indictment. *United States v. Tallant*, 547 F.2d 1291, 1294-1295 (5th Cir. 1977), *cert. denied*, 434 U.S. 889, 98 S.Ct. 262, 54 L.Ed.2d 174 (1978). A judgment entered upon such a plea, however, leaves open for appellate review the sufficiency of the indictment. *United States v. Norris*, 281 U.S. 619, 50 S.Ct. 424, 74 L.Ed. 1076 (1930). The requirement that a restraint on interstate commerce be present is a jurisdictional requirement for an offense under section 1 of the Sherman Act. *United States v. Cadillac Overall Supply Co.*, 568 F.2d 1078 (5th Cir.), *cert. denied*,___U.S.___, 98, S.Ct. 3088, 57 L.Ed. 1133 (1978). This jurisdictional requirement may be met by allegations that the offending acts occurred in the flow of commerce, *see Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186, 195, 95 S.Ct. 392, 42 L.Ed.2d 378

(1974), or substantially affected interstate commerce, *see United States v. Women's Sportswear Manufacturers Association*, 336 U.S. 460, 69 S.Ct. 714, 93 L.Ed. 805 (1949). An indictment may charge either kind of restraint or both. *Las Vegas Merchant Plumbers Association v. United States*, 210 F.2d 732 (9th Cir.), *cert. denied*, 348 U.S. 817, 75 S.Ct. 29, 99 L.Ed. 698 (1954).

In the case at bar, if the indictment sufficiently alleged interstate commerce, then defendants' no contest pleas admitted all the facts necessary for their conviction and the judgment of the district court must be affirmed.

The defendants were charged with engaging in a combination and conspiracy to divide, allocate, and apportion customers in violation of section 1 of the Sherman Act.[1] The pertinent parts of the indictment that alleged the prerequisite restraint on interstate commerce are as follows:

[1] 15 U.S.C.A. §1, as amended, reads:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

IV

TRADE AND COMMERCE

8. There are many users of linen supplies in South Florida, including hotels, motels, restaurants, barber shops, beauty shops, professional offices, hospitals, governmental agencies and other places of business. In a substantial number of cases, these linen supplies are provided by linen service companies. In 1973, the defendant corporations had gross revenues from linen service business of approximately $11 million in South Florida.

9. Linen service companies in South Florida, including the corporate defendants, regularly receive from manufacturers whose plants are located outside the State of Florida substantial shipments of new linen supplies. Such supplies are ordered in anticipation of the continuing demands of the companies' customers for new and replacement linens. The aggregate out-of-state volume of new linen supplies acquired in this manner by the corporate defendants for use in South Florida approximated $4 million in 1973. Thus, during the period of time covered by this indictment, the aforesaid linen supplies were within the constant and continuous flow of interstate commerce.

V

OFFENSE CHARGED

10. Beginning sometime prior to 1964, the exact date being to the grand jurors unknown, and continuing thereafter up to September 1974, the defendants and co-

conspirators engaged in a combination and conspiracy in unreasonable restraint of the above-described interstate trade and commerce in violation of Section 1 of the Act of Congress of July 2, 1890, as amended prior to December 21, 1974 (15 U.S.C. §1), commonly known as the Sherman Act.

11. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding and concert of action among the defendants and co-conspirators, the substantial terms of which were to divide, allocate and apportion customers of the defendant and co-conspirator corporations in South Florida.

. . . . .

VI

EFFECTS

13. The aforesaid combination and conspiracy has had the following effects, among others:

(a) The flow of linen supplies in interstate commerce has been unreasonably restrained;

(b) Competition in the linen service industry in South Florida has been restrained;

. . . . .

[6] We hold that these allegations are sufficient to allege a federal offense under both the "flow of commerce" and the "affecting commerce" tests.

[7-9] "Under the 'flow of commerce' test, the question is at what point along the path from manufacturer to consumer the 'flow' might have stopped, thereby rendering any subsequent anti-competitive conduct purely intrastate in nature." *United States v. Cadillac Overall Supply Co.*, 568 F.2d 1078 (5th Cir.), *cert. denied*, ___U.S.___, 98 S.Ct. 3088, 57 L.Ed. 1133 (1978). The indictment here alleges that the defendants receive linen supplies from out-of-state manufacturers, then states, "[s]uch supplies are ordered in anticipation of the continuing demands of the companies' customers for new and replacement linens." Defendants contend that this statement falls short of alleging a "flow" from manufacturer to consumer because it alleges that the supplies were ordered "in anticipation" of future orders, not in response to prior orders, which means the flow is alleged to end at defendants' warehouses. This interpretation ignores the common sense and plain meaning of the phrase "continuing demands." In context, the quoted sentence alleges a "flow" from manufacturers to defendants to consumers, albeit the goods may temporarily come to rest on defendants' shelves. A temporary pause in transit does not necessarily terminate the interstate journey. *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 569, 63 S.Ct. 332, 87 L.Ed. 460 (1942); *United States v. Cadillac Overall Supply Co., supra.*

[10] Defendants contend that the indictment fails to meet the "affecting commerce" theory because it does not allege delivery to customers, and therefore does not allege interstate commerce upon which their conduct had an effect. They also argue that the indictment fails to allege a "sufficiently substantial" restraint. The first argument fails for the reasons set out above. The second argument is also without merit. The courts look to the

character of the restraint, not the magnitude of the restraint. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 785, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1976); *United States v. Cadillac Overall Supply Co.*, *supra*.

Read as a whole in a common sense fashion, the indictment sufficiently alleges a crime proscribed by the Sherman Act.

AFFIRMED.

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AMERICAN SERVICE CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. Petitioners are in the business of renting or furnishing linen supplies to customers such as hotels, motels, restaurants and barber shops located in Southern Florida. A grand jury indicted petitioners and two other defendants, charging them with conspiring to restrain interstate trade and commerce by allocating their customers, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. The indictment charged that petitioners ordered substantial shipments of linen supplies from out-of-state manufacturers[1] in anticipation of the continuing demands of their customers.[2] It further alleged that the

---

[1]The alleged volume of linen supplies ordered from out-of-state manufacturers in 1973 was approximately $4 million.

[2]In 1973 the participants in the conspiracy allegedly received gross revenues from their linen Service business of approximately $11 million.

conspiracy to allocate customers had the effect of unreasonably restraining the interstate flow of linen supplies (Pet. App. 9-10).

Each petitioner pleaded *nolo contendere*. Petitioners subsequently appealed, arguing that the indictment did not adequately charge a restraint on interstate commerce. The court of appeals rejected that contention, noting that the indictment alleged that petitioners received linen supplies from out-of-state manufacturers in anticipation of the continuing demand of their customers and that such supplies totaled approximately $4 million in 1973. The court concluded that this allegation satisfied the commerce requirement of the Sherman Act (Pet. App. 11-12).

2. The decision of the court of appeals is in accordance with the decisions of this Court, and the petition presents no issue warranting further review. A conspiracy in restraint of trade violates the Sherman Act if it occurs in the flow of interstate commerce or substantially affects such commerce. See, *e.g.*, *Burke* v. *Ford*, 389 U.S. 320, 321 (1967). The court of appeals correctly held that the indictment adequately pleaded the interstate commerce element under both theories.

Although conceding that linen supplies may be part of the flow of commerce even though they are temporarily stored before delivery to customers, petitioners contend that such "goods can retain their interstate label only if they have been ordered in anticipation of the needs of *specific* customers" (Pet. 7; emphasis in original). As the court of appeals pointed out, however, the indictment plainly charged a flow of commerce from out-of-state manufacturers to petitioners for distribution to their customers (Pet. App. 11). See *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 567-569 (1943). The indictment

adequately informed petitioners of the interstate nature of the offense and described the channel of commerce through which the goods flowed. *United States* v. *Wilshire Oil Company of Texas*, 427 F. 2d 969, 974 (10th Cir.), cert. denied, 400 U.S. 829 (1970); *Las Vegas Merchant Plumbers Association* v. *United States*, 210 F. 2d 732, 739-742 (9th Cir.), cert. denied, 348 U.S. 817 (1954); *United States* v. *Cadillac Overall Supply Co.*, 568 F. 2d 1078, 1081-1082 (5th Cir.), cert. denied, No. 77-1389 (June 19, 1978). Nothing more is required of an indictment.[3]

The court of appeals also properly held that the indictment satisfied the interstate commerce requirement by pleading an effect on commerce (Pet. App. 10). The indictment charged that during 1973 some $4 million worth of goods were ordered by petitioners from out-of-state to meet local consumer demand. The indictment further charged that trade in these goods was unreasonably restrained by a customer allocation conspiracy, a *per se* violation of the Sherman Act. Such facts, if proved, would demonstrate that a significant volume of interstate trade was substantially affected by the conspiracy. *Burke* v. *Ford*, *supra*; *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975); *Hospital Building Co.* v. *Trustees of Rex Hospital*, 425 U.S. 738 (1976).

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[3]If the indictment informs a defendant of the elements of the offense, protects him against double jeopardy, and provides enough information to allow him to prepare an adequate defense, then it is sufficient. *Hamling* v. *United States*, 418 U.S. 87, 117 (1974). The government need not catalogue its evidence; it is sufficient to "set forth the offense in the words of the statute itself." *Ibid.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General

JOHN H. SHENEFIELD
Assistant Attorney General

JOHN J. POWERS, III
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Attorneys

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PETITIONERS' REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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PETITIONERS' REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

INTRODUCTORY REMARKS

"GM" refers to Memorandum for the United States In Opposition to the Petition For Writ of Certiorari.

All emphasis is supplied.

FLOW OF COMMERCE

The government simply ignores the language of its own indictment. The indictment does not read, as the government inaccurately suggests, that:

> . . . during 1973 some $4 million worth of goods were ordered by petitioners from out-of-state to meet local consumer demand (GM 3).

Rather, the indictment charges that the goods were ordered "in anticipation of the continuing demands of the [petitioners'] customers . . ." (Pet. App. 9).

"Anticipate" is defined to mean: "To consider in advance, give advance thought . . . to." *Webster's Third New International Dictionary* 94 (Philip B. Grave ed. 1969). Anticipation is synonomous with "hope". *Webster's New World Thesaurus* 16 (Charton G. Laird ed. 1974).

Thus, according to the English language, the indictment charges only that out-of-state goods were ordered by defendants with the "advance thought" or "hope" of resale.

However, unless the goods were ordered to fill petitioners' customers' actual orders, or pursuant to pre-existing arrangements between petitioners and their customers, or perhaps, in anticipation of *specific* customers' needs (statements which are absent from the indictment), the wholly intrastate conspiracy could not have occurred in the "flow of commerce." *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 567-570 (1942).

Accordingly, the cases cited by the Government under their flow argument (GM 3) do not apply. In each, it was either alleged that the defendants:

1. Were "conduits" in a continuous stream [of plumbing goods] from points of origin out of state *to places of use and installation [intra-state]. Las Vegas Merchant Plumbers Association v. United States*, 210 F.2d 732, 738 (9th Cir.), cert. denied, 348 U.S. 817 (1954); or

2. Were involved in the sale of goods (liquid asphalt) which were "transported into the state of Kansas in a continuous uninterrupted flow of interstate commerce directly from [Missouri] to *job sites in Kansas.*" *United States v. Wilshire Oil Company of Texas*, 427 F.2d 969, 974 (10th Cir.), cert. denied, 400 U.S. 829 (1970); or

3. Sold merchandise that was in a "continuous and uninterrupted flow . . . from plants located in states other than Florida to [defendants] within the State of Florida and *then to their customers.*" *United States v. Cadillac Overall Supply Co.*, 568 F.2d 1078, 1082 (5th Cir.), cert. denied, 98 S.Ct. 3088 (1978).

Thus, restraint of trade *in* the "flow of commerce" was alleged by the indictments in the above cases because specific facts were set forth to show that the out-of-state goods did, in fact, travel *beyond* the defendants' warehouses to the defendants' customers.

Void of any like allegations, the subject indictment was jurisdictionally defective under the flow of commerce theory.

AFFECTS COMMERCE

The Government fares no better under its "affects commerce" theory. Even when viewed as a whole, the indictment, at most, states only that petitioners ordered goods from out-of-state and that their purely local conspiracy affected the flow of linen supplies in interstate commerce (Pet. App. 10). However, this generic "affects" language is meaningless since it omits any factual description of any segment of interstate commerce supposedly affected. *See Russell v. United States,* 369 U.S. 749, 763-765 (1962).

The conclusory "affects" allegation required petitioners, first, to guess at the factual bases of their alleged Sherman Act violation, and then, based upon that guess, to offer a defense. Such an indictment which fails to provide enough information to allow the defendant to prepare an adequate defense is constitutionally defective. *Hamling v. United States,* 418 U.S. 87, 117 (1974).

Thus, notwithstanding the Government's argument that, had a trial been held, it could have proved an effect on "interstate commerce" (GM 3), jurisdictional facts showing what and how interstate commerce was affected needed to be alleged in the first instance. Did petitioners' conduct affect commerce in the out-of-state goods ordered by petitioners before their arrival in Florida (unalleged)? Did petitioners' conduct affect commerce in goods sold by their unnamed and unknown co-conspirators (Pet. App. 10) across state lines (unalleged)? Did petitioners' conduct affect interstate commerce simply because they ordered goods from out-of-state and resold them within the state (unalleged)?

Or, did petitioners' conduct affect interstate commerce in some other way based upon some other unalleged government theory.

Indeed, it was only because the *civil* complaint in *Hospital Building Company v. Trustees of Rex Hospital,* 425 U.S. 738 (1978), cited by the Government,* clearly identified the specific areas of interstate activity which the defendants' conduct affected, that the Court held it to be sufficient. *Id.* at 741.

Conversely, the instant indictment is barren of any factual statement describing any area of interstate commerce which petitioners' alleged wrongful conduct may have affected in violation of the Sherman Act. Absent such allegations, only intrastate commerce remains to be affected by petitioners' activities in possible violation of Florida's anti-trust laws. However, petitioners' disregard for Florida law, touching upon the same general subject matter as a federal act, does not expose them to federal prosecution without proper jurisdictional allegations bringing their wrongful conduct within the operation of federal law. *Blitz v. United States,* 153 U.S. 308 (1894).

*The government cites two other cases in support of its "affects" argument: *Burke v. Ford,* 389 U.S. 320 (1967); and, *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975). In both, the Court addressed itself solely to the sufficiency of proof adduced at trial. The adequacy of the civil complaints was neither questioned nor discussed.

CONCLUSION

Despite the Government's claim that the court of appeals' decision is in "accordance with the decisions of this Court," the Government has not cited one antitrust case to support the jurisdictional adequacy of the instant indictment. Rather, the cases cited by the Government demonstrate that the instant indictment is defective on its face.

By reason of the foregoing, and to preclude the instant indictment from becoming a form of dragnet to be used as a model for Sherman Act indictments, certiorari should be granted and the decision of the court of appeals reversed.

WHEREFORE, we respectfully pray for the granting of the Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the aforegoing were mailed to: JOHN H. SHENEFIELD, Assistant Attorney General, JOHN J. POWER, III, DANIEL J. CONWAY, Attorneys, Department of Justice, Washington, D.C., 20530 and to the Solicitor General, Department of Justice, Washington, D.C. this 29th day of December, 1978.

DANIEL NEAL HELLER